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No. 80076-6

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

CLERK

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Respondents,

v.

VIAD CORPORATION,

Petitioner.

BY RONALD R. CARPENTER

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STATE OF WASHINGTON

**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

In the most famous negligence case of all time, *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), Judge Benjamin Cardozo held that defendants owe a duty of reasonable care only to those persons who are within a class of foreseeable victims of negligence. Tort duty can be based only on the foreseeability of harm to the person in fact injured, and not on an abstract duty to the entire world, as dissenting Judge Andrews contended. 248 N.Y. at 350, 162 N.E. at 103 (Andrews, J., dissenting). In that case, a railroad passenger being helped onto a train dropped a package of explosives; they went off, producing vibrations which caused a scale to fall on Mrs. Palsgraf, injuring her. Judge Cardozo found that because the railroad employees could not have anticipated injury to Mrs. Palsgraf, they owed her no duty and, therefore, could not be liable to her for negligence. *Palsgraf*, 248 N.Y. at 343, 162 N.E. at 100. While every act of every person conceivably can be traced to positive or negative effects on others, imposing legal liability for such attenuated results would have serious negative effects on worthwhile economic enterprises.

Although the merits of both Cardozo's and Andrews' approaches have been extensively debated through the years, one conclusion is clear: in tort law, the concept of duty is one in which considerations of public policy

should be primary. “In short, the *Palsgraf* case balanced the ‘justice’ of Mrs. Palsgraf’s position as an innocent passenger injured by the carelessness of a solvent enterprise against the threats to the future financial solvency of that enterprise posed by too extensive an ambit of tort liability.” G. Edward White, *Tort Law In America: An Intellectual History* 99 (1985); see *Kloepfel v. Bokor*, 149 Wn.2d 192, 199, 66 P.3d 630, 634 (2003) (adopting Cardozo’s view).

Like *Palsgraf*, this case presents a question about when duty is owed by a defendant to a victim whose injury is so distant from the defendant’s involvement that imposing liability on the defendant could have seriously harmful consequences for a valuable, socially productive industry. The specific question is whether a manufacturer has a duty to warn the eventual user of the dangers presented by the use or maintenance of another product if it is foreseeable that the two products will be used in tandem. Liability costs are a serious burden on business and impose unnecessary liability risks over-detering economic activity. Over-deterrence imposes significant costs on consumers, resulting in fewer goods and services being made available to the public, and stifles investment, economic growth, and job creation. Allowing negligence liability to attach here would expand the duty of care too far, with potentially dangerous consequences to Washington’s economy.



## IDENTITY AND INTEREST OF AMICUS

PLF is a nonprofit, tax-exempt corporation organized for the purpose of engaging in litigation in matters affecting the public interest. PLF's Northwest Center, based in Bellevue, Washington, has participated as amicus curiae in many cases before this Court. PLF's Free Enterprise Project was developed to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice systems, and barriers to the freedom of contract. Pursuant to this Project, PLF has participated as amicus in this Court involving the reach and scope of civil liability systems. *See, e.g., Briggs v. Nova Services* (docket no. 79615-7, pending) (opposing expansion of the wrongful termination tort); *Korshund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) (opposing creation of a tort of wrongful discipline short of discharge).

## ARGUMENT

### I

#### **IT IS AN UNWARRANTED EXPANSION OF EXISTING LAW TO IMPOSE LIABILITY ON MANUFACTURERS FOR FAILING TO WARN OF THE DANGERS RESULTING FROM A SAFE PRODUCT USED WITH OTHER DANGEROUS PRODUCTS**

The Washington Court of Appeals held that "the danger of asbestos exposure is 'inherent' in the use of the [Giscom Russell evaporator], because

the evaporators were built with the knowledge that insulation would be needed for the units to operate properly and that workers would need to invade the insulation to service the units.” *Simonetta v. Viad Corp.*, 137 Wn. App. 15, 22, 151 P.3d 1019, 1023 (2007). While it is entirely consistent with Washington tort doctrines that manufacturers have a duty to warn about maintenance procedures regarding their own products, manufacturers never have had a duty to warn about dangers of other products manufactured by other companies that, when disturbed in general maintenance procedures, result in potential hazards.

While the court may be correct that its holding is a “logical” extension of existing law (*id.* at 49, 151 P.3d at 1018), this should have been only one factor in its analysis, rather than dispositive. Judge Andrews’ decision in *Palsgraf* was “logical” but, like the court below, failed to consider the important public policies that justify line-drawing when it comes to imposition of a duty. There was nothing about the maintenance of the evaporator itself that necessitated a warning on its safety. It was only because the insulation the Navy chose to use was asbestos insulation, that Simonetta was exposed to asbestos fibers. It is perfectly consistent to hold that Defendants have a duty to warn ultimate users of the hazards inherent in their own

products, but not when the missing warning is regarding a product that is not manufactured or distributed by the defendants.

The court below held that “when a product requires the use of another product and the two together cause a release of a hazardous substance, the manufacturer has a duty to warn about the inherent dangers.” *Simonetta*, 137 Wn. App. at 31, 151 P.3d at 1027. Taken to its logical conclusion, and ignoring public policy, this holding would require all manufactures to warn against *any* possible materials that when used in conjunction with theirs, could result in malfunction. Public policy would never countenance such a result, however, because it places the onus on the defendant who has no control to prevent the harm from occurring and offers the warning from a place where the user is neither expecting to see it nor likely to notice it.<sup>1</sup> *See, e.g., Sperry v. Bauermeister, Inc.*, 4 F.3d 596, 598 (8th Cir. 1993) (holding supplier of spice grinding and dust control component parts of milling system not liable because no evidence existed of defects in the component part); *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989) (holding that

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<sup>1</sup> Courts that generously impose liability on manufacturers for failure to warn provide “an incentive to sellers to overwarn about product risks, which undermines the effectiveness of product warnings to the ultimate detriment of consumers.” Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. Mich. J.L. Ref. 309, 310 (1997). This incentive is heightened because “companies are penalized for underwarning but not for overwarning.” W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 Rutgers L. Rev. 625, 666 (1996). If Viad put the warning on the evaporators, the warning would be seen only after the insulation had been removed for servicing, which presumably would be too late to prevent exposure, requiring a warning that borders on the ridiculous: “If you can read this, you have been exposed to asbestos.”

a component part supplier had no duty to analyze the design of a completed machine using the supplier's nondefective component part); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir. 1986) (holding that a supplier of nondefective component part was not liable when incorporated into larger system); *Cropper v. Rego Distrib. Ctr., Inc.*, 542 F. Supp. 1142, 1156 (D. Del. 1982) (holding that a component part supplier was not liable when integration causes a dangerous condition).

The law of torts is about line-drawing. It is achieved by formulating rules that take into account public policy and balance those policies against the interests of freedom and of injured plaintiffs. *See, e.g., Smith v. Bates Technical College*, 139 Wn.2d 793, 804, 991 P.2d 1135, 1141 (2000) ("Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy.") (quoting *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165, 226 Cal. Rptr. 820, 826 (Cal. Ct. App. 1986)). Courts have long understood that the line of potential liability must be drawn somewhere. *See, e.g., Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096, 1102 (1976) ("Essentially we are balancing the interest of the injured party to compensation against the view that a negligent act should have some end to its legal consequences."); *Kloepfel*, 149 Wn.2d at 199, 66 P.3d at 634 (quoting same). In drawing that line, courts rely on the concepts of duty,

foreseeability, and proximate cause. The duty to use care to avoid injury to others arises from the foreseeability of the risk created. *Rose v. Nevitt*, 56 Wn.2d 882, 885, 355 P.2d 776, 777 (1960). But in each case, public policy considerations—not the single factor of foreseeability—are paramount. According to this Court, “[t]he most common vehicle for circumscribing the boundaries of liability has been the court’s definition of duty.” *Hunsley*, 87 Wn.2d at 434, 553 P.2d at 1102. The importance of foreseeability does not permit a court to abdicate its responsibility to consider the public policy implications, should tort liability be expanded.

Here, this issue is whether or not the Defendants had a duty to warn. “[M]any factors interplay” in finding this duty, including history, morals, and justice, convenience of administration of the rule, and the policy as to “where the loss should fall.” *Hunsley*, 87 Wn.2d at 434, 553 P.2d at 1102. In particular, this Court “‘endeavor[s] to make a rule in each case that will be practical and in keeping with the general understanding of mankind.’” *Id.* at 434-35, 553 P.2d at 1102. Thus, the essential duty of the Court to define duty is in “balancing the interest of the injured party to compensation against the view that a negligent act should have some end to its legal consequences.” *Id.* at 435, 553 P.2d at 1102; *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233, 243; 35 P.3d 1158, 1164 (2001) (“The existence of a duty is a question of law and depends on mixed considerations

of 'logic, common sense, justice, policy, and precedent.' ” (citations omitted)).

Public policies are drawn from the two main functions of tort law. The first is compensation. Negligence law seeks to make whole those who have been injured by people who fail to live up to their social and personal responsibilities. *DeNike v. Mowery*, 69 Wn.2d 357, 358, 418 P.2d 1010, 1012 (1966) (“The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another.” (citation omitted)).

In addition to compensation, tort law also imposes liability so as to deter conduct that creates an unreasonable risk of injury to others. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419, 150 P.3d 545, 548 (2007); Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. Rev. 121, 180-81 (1992) (“To the extent that tort law seeks to deter personal injury, a doctrine that encourages manufacturers to spend their dollars and energy effectively to avoid product-related harms is far better suited to consumer interests than one which compensates some consumers generously after the fact, but which does little beforehand to reduce product risk for all consumers.”).

But there is a point at which imposing liability has negative consequences—where there is a serious risk of discouraging worthwhile conduct. As Justice Breyer explained, courts must take care to strike an effective balance, because “[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would ‘over-deter’ by leading potential defendants to spend more to prevent the activity that causes the economic harm . . . than the cost of the harm itself.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 593, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (Breyer, J., concurring).

The theory adopted by the Court of Appeals, while “logically extending” existing law, contains no logical stopping point. Saucepan manufacturers will have to warn of the dangers of grease fires. Manufacturers of champagne flutes would be required to warn their ultimate users that consuming alcohol can be dangerous, particularly when combined with the use of other products, such as automobiles. Such duties would cause disproportionate economic impacts. As the Eighth Circuit explained in a case involving a component part of a medical device used in the jaw:

(“[T]he cost to a manufacturer of an inherently safe raw material to insure against all conceivable misuse of his product would be prohibitively expensive.”). As another panel of this Court has determined in a previous TMJ case, “[i]t would be unreasonable and impractical to place the burden of testing and developing all devices that incorporate Teflon as a component on Du Pont.” *Rynders* [*v. E.I. Du*

*Pont de Nemours & Co.*, 21 F.3d 835,] 842 (8th Cir. 1994). Suppliers of versatile materials like chains, valves, sand, gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components. *Kealoha [v. E.I. Du Pont de Nemours & Co.]*, 844 F. Supp. 590,] 594 (D. Haw. 1994), *aff'd*, 82 F.3d 894, 901 (9th Cir. 1996) (“[T]here would be no end to potential liability if every manufacturer of nuts, bolts and screws could be held liable when their hardware was used in a defective product.”).

*In re Temporomandibular Joint (TMJ) Implants Products*, 97 F.3d 1050, 1057 (8th Cir. 1996) (citation omitted).

Over-deterrence is a serious concern. Economically speaking, if a business faces too high a potential tort liability, it will invest too many resources in avoiding that liability, rather than into productive enterprises. See Mike D. Murphy, *Note, Market Share Liability New York Style: Negligence in the Air? Hymowitz v. Eli Lilly and Co.*, 55 Mo. L. Rev. 1047, 1067 (1990) (“The consequences of over-deterrence include disincentives for safety to unsafe manufacturers, and a reluctance by ‘leading edge’ companies to introduce new products for fear of potential liability.”). This diverts businesses away from satisfying the needs of consumers, and wastes the energy of entrepreneurs which ought to be focused on producing goods and services at low prices. Modern industrial society is full of potential hazards, and imposing severe costs on parties with only tenuous connections to the harm runs the risk of stifling important economic activity:



The threat of such enormous [damages] awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

*Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (O'Connor and Stevens, JJ., concurring and dissenting) (citations omitted). Limitations on tort liability, therefore, serve an important economic purpose. As Professors Cass Sunstein, Daniel Kahneman, and David Schkade explain:

If [damages] awards are unpredictable . . . resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

Cass R. Sunstein, *et al.*, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 (1998).

The principle that a business should pay for the harms it causes is not, therefore, by itself a sufficient principle for the creation of tort law. Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. "At some point," therefore, "it is generally

agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982).

The common law traditionally dealt with the need to limit tort liability in two ways: the principles of foreseeability (usually in the analysis of whether a duty exists) and of proximate causation. In the realm of foreseeability, courts often have found that defendants have no duty to take burdensome precautions against potential harms that are not reasonably foreseeable, or are simply too unlikely. As this Court explained in *Rose v. Nevitt*, 56 Wn.2d at 885, 355 P.2d at 777, "if the conduct of the actor does not involve an unreasonable risk of harm to the person injured, he owes no duty to that person and, therefore, there is no actionable negligence." For example,

[i]f a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his car, negligence cannot be predicated on the mere fact that he started his machine, injuring the child.

*Id.* at 886, 355 P.3d at 778 (citations omitted); *Romero v. West Valley School Dist.*, 123 Wn. App. 385, 392, 98 P.3d 96, 100 (1994) (same).

Policy considerations counsel against finding liability in a case like this. As Nobel Laureate Friedrich Hayek noted, liability rules “will normally raise the cost of production, or, what amounts to the same thing, reduce over-all productivity.” Friedrich A. Hayek, *The Constitution of Liberty* 224 (1960). A presumption against imposing liability is justified because the “over-all cost is almost always underestimated.” *Id.* at 225. This underestimation is due to the fact that tort law has the potential of stifling entrepreneurial activity, driving away investors, and depriving society of jobs, as well as goods and services, that might otherwise have existed.

The concern for unseen costs is especially acute in a case like this, where the connection between the alleged wrong and the injury suffered is so distant. In one Georgia asbestos case, the court explained there was a “responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree.” *CSX Transp., Inc. v. Williams*, 278 Ga. 888, 890, 608 S.E.2d 208, 209 (Ga. 2005) (“The recognition of a common-law cause of action under the circumstances of this case would . . . expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.”).

Tort liability typically displays a one-way ratchet—it expands but rarely retracts. If the Court were to find liability in this case, it is difficult to

imagine where such liability would stop. See *In re New York City Asbestos Litigation*, 5 N.Y.3d 486, 498, 840 N.E.2d 115, 122, 806 N.Y.S.2d 146, 153 (N.Y. 2005) (refusing to find liability in case where wife was injured by laundering husband's asbestos-covered clothing because "the 'specter of limitless liability' is banished only when the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship'" and there was no relationship between the employer and the wife). Here, the Navy as the employer had a duty to warn its employees of the hazards of asbestos, but there was no relationship between Simonetta and the evaporator manufacturer.

Finally, there is little to be gained by finding liability against defendants that have such attenuated connections to a plaintiff's injury. As the RAND Institute for Civil Justice points out, "[i]f business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure." Stephen J. Carroll, *et al.*, RAND Institute for Civil Justice, *Asbestos Litigation* 129 (2005).<sup>2</sup> The tort system is supposed to create an incentive mechanism that allows businesses to predict, on the basis of anticipated costs and benefits, what sort of risks and practices are legitimate in their pursuit of

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<sup>2</sup> Available at <http://www.rand.org/pubs/monographs/MG162/index.html> (last visited Jan. 31, 2008).

customer satisfaction. *See* Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Cal. L. Rev. 677, 678 (1985) (describing cost-benefit analysis expectations and limitations). But that mechanism is disrupted when a damages verdict is irrationally large or is not based on some clear principle of fault. In those cases, businesses will disregard the confusing signals that tort liability sends them, and will simply consider the cost of tort liability as a general cost of doing business. “When [tort] awards are arbitrary, it becomes impossible to discern any relevant incentives from the pattern of damage awards, leaving businesses only to guess at what business practices will not instigate damage claims.” C. Boyden Gray, *Damage Control*, Wall St. J., Dec. 11, 2002, at A18.

## II

### **ASBESTOS LITIGATION IMPOSES SERIOUS ECONOMIC HARMS ON THE NATION**

Asbestos exposure has become one of the primary targets for abusive and exploitative mass tort litigation. Such litigation harms citizens of Washington by deterring economic investment and job creation and curbing the availability of goods and services on the market—thus increasing the cost of living. Worse, asbestos litigation has created serious injustices in the tort system, by changing the rules and extending liability beyond the traditional

limits of tort law. It is important to consider the ramifications of the expansion of liability sought by the Plaintiffs in this case in the context and history of asbestos litigation as a whole.

Asbestos litigation is now widely recognized as the epicenter of a massive breakdown in American tort law. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-98, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). According to a 2005 report by the RAND Institute, \$54 billion has already been spent on litigation over asbestos-related injuries, more than half of which has gone to “transaction costs,” such as attorneys’ fees. Carroll, *Asbestos Litigation*, at 81. After 30 years, this litigation

has spread well beyond the asbestos-related manufacturing and installation industries . . . to touch almost every form of economic activity that takes place in the United States. [The study] found that 75 out of a total of 83 different types of industries . . . included at least one firm that had been named as an asbestos litigation defendant.

*Id.* Because virtually all manufacturers of products containing asbestos are bankrupt, the plaintiff’s bar has sought out other defendants with peripheral connections to the asbestos industry.

These “peripheral defendants” have only an attenuated connection to asbestos, but are now named in asbestos litigation because of their “deep pockets”; “the net has spread . . . to companies far removed from the scene of any putative wrongdoing.” There were 300 asbestos defendants in 1982; now there are more than 8,500. Asbestos litigation now touches firms in industries engaged in almost every form of

economic activity that takes place in the economy. Senior U.S. District Court Judge Jack Weinstein has said “it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy.”

Steven B. Hantler, *et al.*, *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (citations omitted).

Of course, some of these cases are justified on the merits. There is no doubt that industrial exposure to dangerous chemicals is properly the subject of tort law. The problem is that damages awards have become so vast, and courts have become so willing to bend the rules of tort law in favor of plaintiffs and against “deep pockets” defendants, that asbestos litigation has created an entire industry within the legal profession. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 233 (2006) (identifying two “fundamental phenomena” that combine to create the asbestos litigation crisis: “claimant elasticity,” defined as “the essentially inexhaustible supply of claimants,” and “defendant elasticity,” defined as “the correspondingly unbounded source of defendants,” which stem from “the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as ‘solvent bystanders’” (footnotes and citations omitted)).

This industry is economically wasteful, in that it puts resources into unproductive litigation, drives businesses that do produce social benefits into bankruptcy, and over-deters legitimate enterprises. James Stengel identified 32 bankruptcies related to asbestos litigation just from 2000-2005. *Id.* at 265 (listing each bankrupt company and the year it filed for bankruptcy). Moreover, the financial windfalls produced by verdicts in these cases often fail to effect any reparation or justice. “Plaintiffs’ attorneys collect an estimated \$30 billion annually in legal fees—money that could otherwise help prevent or compensate injuries . . . . [I]n mass tort litigation involving asbestos, two-thirds of insurance expenditures have gone to lawyers and experts.” Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke L.J. 447, 464 (2004).

There appears to be no end in sight. The RAND Institute survey cites a Tillinghast-Towers Perrin projection that the number of claimants in asbestos cases will increase to a total of 1 million plaintiffs, and a total cost of over \$200 billion. *See Carroll, Asbestos Litigation*, at 105. How many businesses will be driven into bankruptcy, and how much time and resources will be exhausted by lawyers and courts investigating and prosecuting these claims, is unclear. And the amount of entrepreneurial activity, industrial



innovation, and increased productivity that will be stifled in the process is impossible to calculate.

Asbestos litigation creates genuine injustices in the name of placing the burden of risk onto those parties that are wealthiest rather than parties that genuinely deserve the blame. So many businesses are at risk for such potentially devastating damages awards with regard to asbestos that some defense lawyers warn their clients that

[t]he turbulent waters of asbestos litigation have seeped into virtually every type of economic activity in our country. Defense attorneys are striving to protect their clients from the perils attendant to the most enduring mass tort litigation recorded in the annals of American jurisprudence—a marathon that has yet to reach full stride.

Kenneth R. Meyer, *et al.*, *Emerging Trends in Asbestos Premises Liability Claims*, 72 Def. Couns. J. 241, 241 (2005). Changing the rules of tort liability, or easing the burden on plaintiffs to prove causation and foreseeability so as to allow plaintiffs to recover, is to transform the system from one of justice to one which redistributes wealth on the basis of a jury's subjective feelings of compassion. It is unjust for the courts to treat litigants differently, or to presume their guilt, simply on the basis of their relative wealth to find defendants liable where their connection to the plaintiff's injury is weak. As the RAND Institute points out, "[r]equiring companies that played a relatively small role in exposing workers to asbestos to bear

substantial costs of compensating for asbestos injuries . . . raises fundamental questions of fairness.” Carroll, *Asbestos Litigation*, at 129.

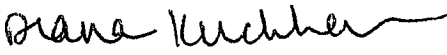
### CONCLUSION

The decision below should be *reversed*.

DATED: February 6, 2008.

Respectfully submitted,

DEBORAH J. LA FETRA  
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ALISSA J. STRONG  
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BY RONALD R. CARPENTER

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